



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: W.M. Schlosser Company, Incorporated

File: B-247579.2

Date: July 8, 1992

Richard L. Moorhouse, Esq., and Stephen B. Shapiro, Esq., Dunnells, Duvall & Porter, for the protester.
R. W. Carter for Jowett, Inc., an interested party.
Vicki E. O'Keefe, Esq., and Paul M. Fisher, Esq., Department of the Navy, for the agency.
Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where an agency conducted meaningful discussions, it was not required to reopen discussions after the submission of best and final offers (BAFO) in order to afford the protester an opportunity to resolve remaining weaknesses in its technical proposal and to resolve deficiencies first introduced in its BAFO.

2. Where the solicitation stated that technical evaluation factors and an offeror's evaluated price were of equal importance and that the award would be made to the most advantageous offeror, the agency reasonably awarded a contract to a lower technically rated, lower priced offeror instead of to the protester, a higher technically rated, higher priced offeror, where it was determined that the difference in the protester's and the awardee's technical ratings did not warrant paying a price premium to the protester.

DECISION

W.M. Schlosser Company, Incorporated protests the award of a contract to Jowett, Inc. under request for proposals (RFP) No. N62477-90-R-0244, issued by the Department of the Navy for the construction of an explosive processing and assembly building at the Naval Ordnance Station, Indian Head, Maryland. The protester alleges that the agency failed to conduct meaningful discussions and it challenges the agency's award decision.

We deny the protest.

The solicitation, issued on October 12, 1990, contemplated the award of a firm, fixed-price contract. The solicitation, as amended, contained the following technical evaluation factors and the percentage weight factor assigned to each evaluation factor: (1) specialized construction experience (30); (2) prime contractor's experience (25); (3) construction schedule (20); (4) quality control plan (15); and (5) staffing and subcontractors (10). The solicitation stated that the award would be made to the responsible offeror whose proposal, conforming to the solicitation, was most advantageous to the government, price and other factors considered. The solicitation further stated that the technical evaluation factors and an offeror's evaluated price were of equal importance.

Four firms, including the protester and Jowett, submitted initial proposals by the November 15 closing date. Technical proposals were evaluated by the agency's five-member technical evaluation panel (TEP). Each TEP member individually scored each offeror's technical proposal for each technical evaluation factor by assigning points corresponding to adjectival descriptions (i.e., unsatisfactory--0 points; poor--.1 to .4 points; satisfactory--.5 to .6 points; good--.7 to .8 points; and excellent--.9 to 1.0 points). The TEP prepared written narratives listing the strengths and weaknesses of each offeror's proposal, and noted the specific deficiencies and omissions in each offeror's proposal which would be the subject of discussions. The individual scores then were multiplied by the assigned percentage weight factors to determine an offeror's total weighted technical score from each TEP member. The total weighted technical scores were averaged to determine an overall, weighted consensus score for each offeror. Price proposals were evaluated by the agency's price evaluation panel (PEP). The PEP did not assign numerical scores, but noted the specific deficiencies in each offeror's price proposal which would be the subject of discussions.

The TEP and PEP submitted their respective evaluations to the agency's source selection advisory board (SSAB) for review. The SSAB included all proposals in the competitive range. The contracting officer conducted two rounds of discussions with each offeror. Following the evaluation by the respective evaluation panels of each offeror's responses to the technical and price discussion questions, the contracting officer requested the submission of best and final offers (BAFOs) from each offeror by February 15, 1991.

For their respective BAFOs, the protester's overall, weighted consensus score was 73.75 out of 100 points and Jowett's overall, weighted consensus score was 60.5 out of 100 points. The protester's evaluated price was approximately 18 percent higher than Jowett's evaluated price. While the SSAB recommended to the source selection authority (SSA) that the award be made to Jowett, a moratorium on military construction awards prevented the SSA from making an immediate award to Jowett. On January 24, 1992, a waiver from the moratorium was granted for the project.

Because BAFOs were almost 1 year old at the time the waiver was granted, by letters dated January 30, the contracting officer requested each offeror to submit a second BAFO by February 2. The contracting officer requested each offeror to review its technical and price proposals and either confirm that both were still valid as submitted or make revisions as necessary. The protester submitted revised technical and price proposals and Jowett submitted a revised price proposal.

On February 14, three members of the TEP evaluated the technical portion of the protester's second BAFO.¹ The PEP evaluated each offeror's second BAFO price. For their respective second BAFOs, the protester's overall, weighted consensus score was 70 out of 100 points and Jowett's overall, weighted consensus score was 57 out of 100 points. The protester's evaluated price was approximately 12 percent higher than Jowett's evaluated price. The SSAB again recommended to the SSA that the award be made to Jowett as the most advantageous offeror.

The SSA acknowledged that while the protester submitted the highest technically rated proposal, it also had the highest evaluated price. The SSA further acknowledged that while Jowett received a lower technical rating, it nevertheless submitted an acceptable proposal at a price 12 percent less than the protester's price. The SSA determined that the protester's technical superiority did not justify paying a price premium. The SSA concurred with the SSAB's recommendation that the award be made to Jowett as the most advantageous offeror, and on February 28, the contracting officer notified Jowett that it had been selected for award. On March 6, the protester filed this protest.

¹At the time of submission of the second BAFOs, two of the original TEP members were no longer employed by the agency. The agency disregarded the technical evaluations of the former TEP members and recalculated each offeror's technical rating. The recalculations did not affect any offeror's relative standing.

The protester argues that due to a lack of meaningful discussions after its submission of its second BAFO, particularly since discussions had concluded over a year earlier and almost 1 year had elapsed since it submitted its first BAFO, its proposal was improperly evaluated for the technical evaluation factors involving its construction scheduling and its quality control plan. The protester argues that to the extent the agency believed that weaknesses and deficiencies existed in its second BAFO concerning these areas, the agency should have reopened discussions after evaluating its second BAFO and afforded it an opportunity to correct the weaknesses and deficiencies. The protester asserts that if this had been done, its ratings for these evaluation factors would have been higher.

For discussions in a negotiated procurement to be meaningful, contracting agencies must advise offerors in the competitive range of weaknesses, excesses, or deficiencies in their proposals and afford them an opportunity to satisfy the government's requirements through the submission of revised proposals. Federal Acquisition Regulation § 15.610; Califone Int'l, Inc., B-246233; B-246233.2, Feb. 25, 1992, 92-1 CPD ¶ 226; Communications Int'l, Inc., B-246076, Feb. 18, 1992, 92-1 CPD ¶ 194. Agencies, however, are not required to notify offerors of deficiencies remaining in their proposals or to conduct successive rounds of discussions until omissions are corrected. Culver Health Corp., B-242902, June 10, 1991, 91-1 CPD ¶ 556. Once offerors are given an opportunity to submit BAFOs, agencies need not reopen discussions to resolve technical deficiencies remaining or first introduced in the BAFO. Intertec Aviation, B-239672.4, Apr. 4, 1991, 91-1 CPD ¶ 348; IBI Sec. Serv., Inc., B-216799, July 25, 1985, 85-2 CPD ¶ 85.

With respect to the construction scheduling technical evaluation factor, the protester, in its initial proposal, failed to address the point in time when it would submit its sediment and erosion control plan for approval by the appropriate state environmental authorities. In the first set of written discussion questions, the protester was asked "to address sediment and erosion control plan submittal and approval." In its revised proposal, the protester generally addressed its plan as "the first order of business," but failed to specifically address at what point in time or at what phase in the construction process it would submit its plan for approval. In the second set of written discussion questions, the protester was asked "where, specifically, in the schedule submitted, does the process of sediment and erosion control plan submittal and approval occur?" The protester responded that it would submit its plan for approval concurrent with site grading and excavation. The record shows that while the TEP had concerns with the

feasibility of submitting a plan for approval concurrent with site grading and excavation, the TEP nevertheless determined that the protester's overall construction scheduling was satisfactory and, of the four offerors, rated the protester the highest for the construction scheduling evaluation factor.

In its second BAFO, the protester submitted a revised sediment and erosion control plan. While the TEP recognized that the protester's approach for sediment and erosion control was improved by its description of a preliminary sediment control plan and an anticipated schedule for implementing the construction contemplated by the plan, the TEP noted that in revising its plan, the protester failed to address at what phase in the construction process it intended to submit its plan to the appropriate state environmental authorities for approval. The record shows, however, that the TEP did not downgrade the protester for this omission and the protester's final rating for the construction scheduling evaluation factor was the same as its rating after the evaluation of its first BAFO.

While the protester argues that after evaluating its second BAFO, the agency should have reopened discussions because it still had concerns about the protester's timing for submitting and receiving approval for its sediment and erosion control plan, we find that the agency was not obligated to reopen discussions in order to afford the protester another opportunity to resolve this continuing timing weakness. The record shows that the agency previously conducted two rounds of discussions with the protester, and we find these discussions were meaningful. The agency specifically focused the protester's attention on the fact that the agency wanted to know when in the construction process the protester intended to submit its plan for approval. The protester was given repeated opportunities to satisfactorily address this matter. When the protester revised its plan in its second BAFO and failed to address the timing matter altogether, it risked having this omission deemed a continuing, unresolved weakness for which it would not be given another opportunity to correct. Even with this unresolved matter, the record shows that the protester was not penalized for the construction scheduling technical evaluation factor when its second BAFO was evaluated. The protester was rated satisfactory, and in

fact, received the highest rating of all of the offerors for this evaluation factor. We have no basis to object to this evaluation.²

With respect to the quality control plan technical evaluation factor, the solicitation listed minimum requirements for an offeror's quality control staff, which was to include a quality control representative who ultimately would be responsible for the implementation of the offeror's quality control program. The solicitation required offerors to submit the names and qualifications of its quality control personnel. The protester, in its initial proposal, submitted a quality control plan in which it described its quality control organization and the duties and responsibilities of its quality control personnel; it listed previous projects where quality control plans were implemented, and included customer references; and it proposed specific individuals for its quality control staff, including an individual for the quality control representative position, and provided resumes for these individuals. The TEP determined that the protester's overall quality control plan was satisfactory, and noted that the individual proposed for the position of quality control representative exceeded the requirements of the solicitation because this individual was a registered professional engineer, not merely a graduate engineer. Discussions under this evaluation factor focused on the protester's use of outside testing laboratories and required quality control inspections. After evaluating the protester's responses to the discussion questions and its first BAFO, the TEP rated the protester satisfactory for the quality control evaluation factor.

²We note that Jowett's proposal suffered from the same weakness as the protester's proposal with respect to its sediment and erosion control plan. Thus, assuming Schlosser could have improved its proposal, there is considerable question whether the protester's evaluation would have improved relative to Jowett's, whose proposal also might have been improved. Accordingly, the protester has not shown that the agency's failure to reopen discussions on this matter would have affected the ultimate award decision.

In its second BAFO, the protester revised its quality control plan by deleting all references to the individuals it previously proposed for its quality control staff, including the individual it named to the quality control representative position. The protester generally stated that it would appoint a registered professional engineer to the position of chief quality control officer. The protester did not address the individuals who would be appointed to the other quality control staff positions. The protester included no resumes with its second BAFO. The TEP downgraded the protester from satisfactory to poor for the quality control plan technical evaluation factor because it found that the protester's revised quality control plan was too general and that the protester failed to specifically designate and provide qualifications for its quality control representative and other quality control staff.

The protester argues that after a year, the agency should have reopened discussions upon evaluating its second BAFO to afford it an opportunity to resolve the deficiencies associated with its revised quality control plan, primarily its failure to designate specific individuals for the required quality control personnel positions. The record shows that until the protester's submission of its second BAFO, the agency had no concerns with the personnel to be assigned by the protester to perform the quality control requirements of the solicitation. The agency considered the protester's overall quality control plan to be satisfactory. When the protester revised its quality control plan in its second BAFO and failed to designate and provide qualifications for the required quality control personnel, we find the protester introduced a previously non-existing deficiency in its BAFO and the agency was not required to reopen discussions to afford the protester an opportunity to resolve the deficiency. See Addsko Indus., Inc., B-233693, Mar. 28, 1989, 89-1 CPD ¶ 317. In our view, the agency reasonably downgraded the protester from satisfactory to poor for the quality control plan technical evaluation factor based on the protester's lack of quality control personnel information in its second BAFO.

The protester finally challenges the SSA's price/technical tradeoff determination which resulted in the award to Jowett. The protester contends that despite its higher evaluated price, it should have received the award as the highest technically rated offeror.

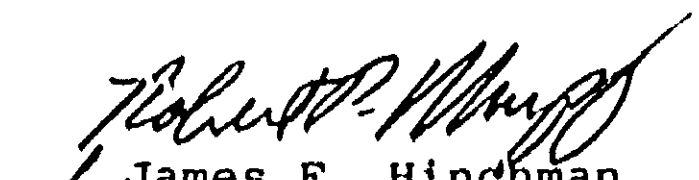
In a negotiated procurement, an agency may award to a lower priced, lower technically rated offeror if it determines that the price premium involved in awarding to a higher technically rated, higher priced offeror is not justified given the acceptable level of technical competence at the lower price. Research Analysis and Maintenance, Inc., B-239223, Aug. 10, 1990, 90-2 CPD ¶ 129. The determining element is not the difference in technical merit, per se, but the contracting agency's judgment concerning the significance of that difference and whether the award decision was reasonable in light of the solicitation evaluation scheme. Carrie Joint Venture, B-233702, Mar. 13, 1989, 89-1 CPD ¶ 268.

Here, the solicitation stated that the award would be made to the offeror whose proposal, conforming to the solicitation, was most advantageous to the government, price and technical evaluation factors considered. The solicitation further stated that the technical evaluation factors and an offeror's evaluated price were of equal importance. In making the price/technical tradeoff determination, the solicitation did not require that the SSA use any precise formula for determining which offeror submitted the most advantageous proposal to the government.

The record shows that although the protester submitted the highest technically rated proposal and Jowett submitted a lower technically rated proposal, the SSA determined that both firms could satisfactorily perform the contract. This determination was supported by the TEP's findings. The record also shows that the SSA recognized that because Jowett did not receive as high a technical rating as the protester, there was a risk that the government could incur greater oversight costs in monitoring Jowett's performance as opposed to the protester's performance. The SSA nevertheless determined that because Jowett submitted a satisfactory proposal and was deemed capable of performing the solicitation requirements, the costs associated with additional oversight of Jowett's performance would not equal the 12 percent difference in evaluated prices between the protester's and Jowett's proposals. For this reason, the SSA concluded that the difference in the protester's and Jowett's technical ratings did not warrant paying a percent price premium to the protester. We find the agency

reasonably awarded the contract to Jowett, a lower technically rated, lower priced offeror in accordance with the solicitation's stated evaluation methodology.³

Accordingly, the protest is denied.


James F. Hinchman
General Counsel

³The protester complained that the SSA did not contemporaneously document his reasons for the price/technical tradeoff determination and requested that our Office ignore the SSA's affidavit, which included detailed reasons, filed with the agency report in response to this protest. In reviewing a selection determination, we will look at the entire record, including statements and arguments submitted during the protest. See Burnside-Ott Aviation Training Center, Inc.; Reflectone Training Sys., Inc., B-233113; B-233113.2, Feb. 15, 1989, 89-1 CPD ¶ 158. While the SSA did not contemporaneously detail in his source selection document his reasons for his tradeoff determination, the SSA's tradeoff determination is supported by the record, including the contemporaneous TEP evaluation documents, and as discussed, was consistent with the solicitation's stated evaluation methodology.